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August 10, 1995

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VIA EXPRESS MAIL

William Caton, Acting Secretary
Federal Communications Commission
1919 M Street, N.W., Room 222
Washington, D.C. 20554

RECEIVED

AUG 11 1995

FCC MAIL ROOM

**RE: IN THE MATTER OF IMPLEMENTATION OF SECTIONS OF THE
CABLE TELEVISION CONSUMER PROTECTION AND
COMPETITION ACT OF 1992: RATE REGULATION
DOCKET NOS.: 92-266 AND 93-215/
FCC 95-196**


Dear Mr. Caton:

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Enclosed for filing please find an original and fourteen (14) copies of a Petition for Reconsideration, with attached Certification of Deputy Attorney General Christian A. Arnold, together with an original and fourteen (14) copies of a Motion for Stay in the above-captioned matter filed on behalf of the New Jersey Board of Public Utilities.

Respectfully submitted,

DEBORAH T. PORITZ
ATTORNEY GENERAL OF NEW JERSEY

By: 
James Eric Andrews
Deputy Attorney General

JEA:mlm
Enclosures

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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

7-10-95

11 1995

FCC. LTR.

FEDERAL COMMUNICATION COMMISSION'S
SIXTH REPORT AND ORDER AND
ELEVENTH ORDER OF RECONSIDERATION
IN THE MATTER OF IMPLEMENTATION
OF SECTIONS OF THE CABLE
TELEVISION CONSUMER PROTECTION
ACT OF 1992: RATE REGULATION

MM DOCKET NOS.: 92-266 AND
93-215

FCC 95-196

MOTION FOR STAY

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I. INTRODUCTION

The New Jersey Board of Public Utilities (the "Board"), by its attorneys, pursuant to 47 C.F.R. §1.429 (k), hereby files a Notice of Motion for a Stay with the Federal Communications Commission (the "FCC" or "Commission") of paragraph 74 of the Sixth Report and Order and Eleventh Order on Reconsideration (hereinafter "Eleventh Order on Reconsideration" or "Commission's Order") released by the Commission on June 5, 1995 and published in the Federal Register on July 12, 1995. Paragraph 74 and the rules promulgated thereunder allow small systems to use the cost-of-service approach set forth in the Eleventh Order on Reconsideration to justify rates for matters pending before franchising authorities if the system shows that it met the new definition of "small system" as of June 5, 1995 and prior thereto for the period during which the disputed rates were in effect.

Application of the Commission's new definition of a small system to pending matters will allow at least one cable operator in New Jersey to have an unfair advantage with respect to the setting of

rates, because the cable operator as of the effective date of the FCC's rules promulgated under the Commission's Order, will now be able to increase its rate for all channels from \$23.00 per month up to a presumed reasonable charge of \$74.40 per month, or whatever lesser amount the cable operator calculates pursuant to the Commission's new Form 1230, unless the Board meets the burden of showing that the rate calculated is unreasonable. As this represents an unprecedented shift in the burden of proof from the cable operator to the franchising authority, retroactive application of this ruling to a matter which has been substantially reviewed by the Board's staff and which has also been the subject of extensive settlement discussions, is not in the public interest. Because the Commission's decision will irreparably harm subscribers in New Jersey, Hunterdon County, and will not harm other parties if the stay is granted, the Board believes that a stay of paragraph 74 of the Commission's Order is warranted. Therefore, the Board respectfully requests that the Commission stay paragraph 74 of the Eleventh Order on Reconsideration and the rules promulgated thereunder pending resolution of the Board's Petition for Reconsideration filed under separate cover even date with the within Motion.

II. PROCEDURAL HISTORY AND STATEMENT OF FACTS

Pursuant to the New Jersey Cable Television Act, N.J.S.A. 48:5A-1 et seq., the Board is the franchising authority for cable television operators in the State of New Jersey. In this regard, the Board regulates the rates of cable television operators as permitted

by law. N.J.S.A. 48:5A-11. On August 18, 1993, in Docket no. CX93060210, the Board rendered an Order Delegating Authority finding that the Board has the Authority to regulate basic cable television rates and rates for associated equipment, installation and additional outlets. Furthermore, in that Order, the Board delegated to the Director of its Office of Cable Television (the "OCTV") the authority to file for certification with the FCC pursuant to 47 C.F.R. § 76.910 for the Board's authority to regulate cable television rates in New Jersey. On August 27, 1993, the OCTV submitted a Notice of Intent to regulate cable television rates with the FCC in accordance with 47 C.F.R. § 76.910 (b); the form was received by the FCC on September 1, 1993. The Board received no notification from the FCC that it could not be certified to regulate cable television basic rates and therefore, pursuant to 47 C.F.R. § 76.910 (e), the Board was certified to regulate basic service rates, equipment charges and additional outlets in New Jersey as of October 1, 1993.

Under the Eleventh Order on Reconsideration, the Commission revised its definition of small systems and determined that rates for small systems will be based on total operating expenses, net rate base, rate of return, channel count and subscribers, which items will be used to generate a per-channel rate presumed reasonable if at or below \$1.24 per channel. The Commission also determined that if the rate requested is at or below the \$1.24 per channel amount, the franchising authority will have the burden of showing that the rate generated is unreasonable because the cable operator either did not interpret the data reasonably or allocate its cost and expense data properly. Id. at para. 54.

Moreover, the Commission has stated that the cable operator will have wide discretion in choosing methods of calculating operating costs, rate base, and rate of return, and that the franchising authority should only make reasonable discovery requests where the requested rate is below the \$1.24 per-channel amount Id. at para. 65.

In paragraph 74 of the Commission's Eleventh Order on Reconsideration, the Commission determined that the provisions of the above Order and the rules promulgated thereunder would be applied to all matters pending before franchising authorities if they meet the new definition of small system under the Commission's rules. Thus, the Commission stated that it "will direct franchising authorities to permit systems to use the small system cost-of-service approach to justify rates in any proceeding that is pending as of the date this item is released, using data that was accurate as of the time the rates were charged." Id. at para. 74. As an example of the problems that can arise as a result of application of paragraph 74 of the Commission's Order, the case of Service Electric Cable TV of Hunterdon (hereinafter "Service Electric") in BPU Docket No. CR94060241, is instructive. Service Electric is a cable operator subject to the Board's jurisdiction, which on July 14, 1994, filed a cost-of-service petition pursuant to FCC rules with the Board wherein it requested an increase in its rate for 60 channels from \$21.00 per month to a maximum permitted amount of \$26.31 per month. Service Electric offers to subscribers a collapsed tier, that is, its 60 channels are all regulated by the Board as basic programming. Because paragraph 74 allows for application of the new rules on small systems to all pending

matters, its provisions may result in the retroactive redefinition of Service Electric as a "small system" for the entire period during which its disputed rates have been in effect.

As of June 5, 1995, Service Electric and the Board's staff were engaged in settlement discussions with regard to the appropriate rates to be charged. While a tentative settlement was reached, it was not executed or approved by the Board prior to the release date of the Commission's Order. In response to the Commission's issuance of its Order, Service Electric determined that it would not stipulate to rates as planned but believing it is a small system under the new definition set forth in the Commission's Order, would instead file a 1230 Form in accordance with the Commission's new rules. -

III. ARGUMENT

It is the Board's position that paragraph 74 of the Eleventh Order on Reconsideration and the rules promulgated thereunder should be stayed because in the absence of such action the Service Electric subscribers will suffer irreparable harm resulting from the virtual deregulation of the cable operators rates. As argued below, if Service Electric is redefined as a small system pursuant to the Commission's Order, the Board will loose substantial control over the rates the operator will be allowed to charge. Moreover, any delay in the implementation of paragraph 74 will not harm interested parties, as a final decision by the Commission adverse to the Board with regard to its pending Petition for Reconsideration would allow for retroactive relief for operators affected by the decision.

The Board urges the Commission to consider the facts relating to the above referenced Service Electric case as they relate to application of paragraph 74 of its Order because to do so would serve to protect the interests of subscribers and would therefore be in the public interest. Should Service Electric seek the maximum amount deemed reasonable by the Commission under the Form 1230 process, multiplication of Service Electric's regulated 60 channels by the \$1.24 per-channel amount would result in an increase in its rate from \$23.00 per month to \$74.40 per month. The Board recognizes that it is unlikely that the revenue data provided on Service Electric's 1230 Form will generate a maximum permitted rate of \$74.40 per month, but is concerned, given the Commission's finding in paragraph 65 of the Eleventh Order on Reconsideration that discovery with regard to data on the company's operations should be limited, particularly when less than \$1.24 per channel is requested, that the amount calculated in Service Electric's 1230 Form will be difficult if not impossible to challenge. Moreover, under the Commission's Order and the Form 1230 process, the Board will be forced to carry the burden of showing that an increase in rates of up to the \$1.24 per channel is unreasonable. Eleventh Order on Reconsideration at para. 54. This shift in the burden of proof from cable operators to the Board is unprecedented and runs counter to the public interest because it will necessitate the use of Board and State resources not usually required, through the presentation at hearing of expert testimony establishing why Form 1230 derives an unreasonable rate under the facts and circumstances involved.

In view of this shift in burden of proof, application of the Eleventh Order on Reconsideration and the rules promulgated thereunder to matters pending before the Board, should it be determined that Service Electric is indeed a small system under the above rules, will result in the Board effectively being precluded from definitively establishing whether Service Electric's subscribers are being charged a reasonable rate. Thus, because the Commission discourages any discovery request which calls for a detailed explanation of a "small system's" operations, and because the Board will now have to commit additional resources in a proceeding to carry its burden if the rate sought is below the \$1.24 per channel amount, the Board's ability to ascertain the operator's true costs will be severally constrained. Moreover, it is particularly unfair to subscribers and the Board to apply such a ruling to pending cases after substantial resources have already been devoted to the matters. Discontinuance of this process after the expenditure of the State's resources and time only highlights the need for the elimination of the Commission's provisions in paragraph 74.

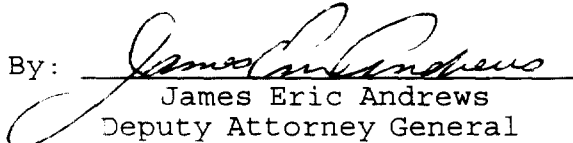
IV. CONCLUSION

For the foregoing reasons and in the interest of fairness to subscribers, the Board respectfully requests that the Commission, pursuant to 47 C.F.R. § 1.429 (k), stay paragraph 74 of the Eleventh Order on Reconsideration and the rules promulgated thereunder pending

consideration by the Commission of the Board's Petition for Reconsideration.

Respectfully submitted,

DEBORAH T. PORITZ
ATTORNEY GENERAL OF NEW JERSEY
Attorney for New Jersey Board
of Public Utilities

By: 
James Eric Andrews
Deputy Attorney General

Dated: 7/10/95